SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1041 105

DAVID W. WALLACE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF SAID PETITION.

WILLIAM B. MAHONEY,
Counsel for Petitioner.

INDEX.

Subject Index.

Citations.

Cases:

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THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, DAVID W. WALLACE, respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered on the 4th day of March, 1944, reversing a judgment of the United States District Court for the Western District of New York, which had directed the United States of America to refund to the petitioner the amount of income tax erroneously and illegally exacted and collected for the year of 1929.

Opinions Below.

1. An opinion by the Hon. John Knight, District Court Judge (R. 26-27), is reported in 2 F. R. D. 173.

2. An opinion by the Hon. John Knight, District Court Judge (R. 32-36), is reported in 50 F. Supp. 178.

3. The opinion of the Circuit Court of Appeals (R. 51) is not yet reported.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals was entered on March 4, 1944 (R. 58). The jurisdiction of this Court is invoked under the Judicial Code, Section 240(a), Title 28 U. S. C. A. 347, Act of February 13, 1925.

Statutes and Rules Involved.

The statutes and rules involved are as follows: Rule 1, 6(b), 6(c), 60(b) and 83 of Federal Rules of Civil Procedure and Rules of the District Court for the Western District of New York, the pertinent provisions of which are set forth in Appendix "A" to this petition.

Question Presented.

Was the order of the Trial Court of February 4, 1941, vacating and setting aside its order of May 19, 1938, a valid exercise of its power pursuant to the Federal Rules of Civil Procedure and the Rules of the United States District Court for the Western District of New York?[1]

Statement.

Petitioner, together with his partner, Edward E. Trost, on October 14, 1933, instituted individual actions against Respondent seeking recovery for overpayment of their income tax for year of 1929 (R. 1, 14).

At the time of the institution of such actions, Edward E. Trost had a claim pending before the United States Board of Tax Appeals to recover an additional assessment on his income tax for the year of 1930 (R. 15).

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[1] The Government asserted in its brief in the Circuit Court alleged error as to the merits of the judgment, but abandoned such argument on the appeal (R. 41, 52).

The present action, as well as the claim pending before the Board of Tax Appeals, involved the identical question, namely: whether income of tax payers should be assessed as "ordinary income" or as "capital net gain" (R. 15). Trial of the above case was withheld pending decision of Board of Tax Appeals which was handed down in 1936 (R. 15).

The taxpayer noticed the case for trial from 1934 to November, 1937 (R. 8, 12). On November 9, 1937, at call of calendar, Government orally moved to dismiss case, which motion was granted (R. 9, 13) and no formal order of dismissal was entered by Government until May 13, 1938 (R. 7, 8, 13).

On November 4, 1940, Wallace moved to set aside order of May 13, 1938 and to restore case to the Ready Calendar pursuant to Rule 16 of the Rules of the District Court for the Western District of New York (R. 9-10). An affidavit of State Senator Walter J. Mahoney, an associate of petitioner's attorney, was submitted in support of the motion setting forth that the Legislature was in session from January 1, 1938 and that the order of dismissal was permitted to be entered through inadvertence (R. 10, 11). Government opposed such motion setting forth that seven years had elapsed since the institution of such action, without any action having been taken by plaintiff for trial of such case (R. 11-14). Petitioner's counsel submitted an affidavit assigning as reason for delay that United States Attorney and said counsel agreed to postpone the trial of said action pending outcome of a case then pending before Board of Tax Appeals involving 1930 income tax liability of Edward E. Trost, a partner of petitioner; such decision was rendered in March, 1936 (R. 14, 15). Affidavit further stated that facts in the said case were identical with the facts in the *Trost* case and further that said case was then on the trial calendar of said Court (R. 15, 16); and that in

both the above action and the *Trost* case, petitioner's counsel had submitted a proposed statement of fact to the United States Attorney, and that the same in *Trost* case was submitted to Washington and returned with a modified form of an agreed statement of fact; and that agreed statement of fact was submitted in above, as well as in *Trost* case, with such affidavit (R. 16, 17).

On January 25, 1941, United States Attorney, during pendency of motion, communicated with petitioner's counsel by letter as to substance of conversation between United States Attorney and Judge Knight as to furnishing of additional affidavit on behalf of Wallace and that taxpayer's counsel should attach to affidavit suggested findings of fact (Appendix B).

Affidavit requested, together with proposed stipulation of fact, was submitted (R. 14-17).

On February 14, 1941, the Court granted an order vacating and setting aside its order of dismissal of May 13, 1938 and restored the same to the trial calendar (R. 17, 18).

On March 20, 1941, petitioner's counsel inquired of United States Attorney as to delay concerning proposed stipulations of fact submitted three weeks prior to said date (Appendix C).

On March 21, 1941 United States Attorney enclosed original of stipulation of facts in *Wallace* and *Trost* cases, with request to sign and return same so that trial date might be designated (Appendix D).

On April 22, 1941, United States Attorney sent to petitioner's attorney one copy of stipulation of facts in *Wallace* and *Trost* cases, and original of same was filed in the office of United States District Court Clerk (Appendix E).

On August 5, 1941, Government filed a motion to vacate order of February 14, 1941, pursuant to provisions of Rule 60 of the Federal Rules of Civil Procedure (R. 18-22). Affidavit of Government's counsel stated that he did not

believe he had called Court's attention to Rule 60 either through his inadvertence or ignorance (R. 21). Taxpayer's attorney filed opposing affidavit setting forth that United States Attorney had consented to the granting and entry of the order of February 14, 1941 on condition that stipulation of facts would be served and early trial had (R. 23). This motion was denied (R. 26-27).

Government moved for dismissal of complaint at opening of trial, on ground that Court was without jurisdiction (R. 32, 33) and same was denied (R. 32).

On April 19, 1943, Court filed its holding that it had jurisdiction and that Commissioner of Internal Revenue had erroneously taxed the gains from the sale of securities as ordinary income instead of as capital net gain (R. 32-36). A judgment was entered on May 17, 1943, for Four Thousand Four Hundred Nineteen Dollars and Thirty-five Cents ($4,419.35), together with interest (R. 39-40).

A notice of appeal was filed on August 13, 1943 (R. 40). The judgment was reversed on March 4, 1944 (R. 58). An opinion was delivered by Justice Frank (R. 52-57) wherein it was held that the vacating order of February 14, 1941, was unauthorized and therefore the Court had no jurisdiction to render a judgment (R. 57)). The Government, on appeal, abandoned its argument that, on the merits, Wallace was not entitled to be repaid the amount of the judgment (R. 52).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred—

(1) In holding that the order of February 14, 1941, was wholly unauthorized and that the trial court had nothing before it and that its judgment on the merits was erroneous (R. 57).

(2) In holding that Government counsel could not waive the performance of a ministerial act, and that he could not

consent to the vacating of an order improperly entered (R. 53).

(3) In holding that Rule 6(b) of the F. R. C. P. does not permit a court, for cause shown, to extend the six months' period designated in Rule 60(b) of said rules.

(4) In holding that Rule 6(c) of the F. R. C. P. does not empower the Court, after expiration of its term, to do any act or take any proceeding in any civil action which has been pending before it (R. 56) and does not provide an exception to Rule 60(b).

(5) In holding that the kind of relief which petitioner sought on his motion to vacate and set aside order of dismissal, could not before the promulgation of present Rules, have been accorded him in ancillary proceedings.

Reasons for Granting the Writ.

I.

The decision of the court below appears to be in direct conflict with its own decision to effect that the Court, without resort to a separate suit in the nature of a bill of review, could vacate judgment based upon a mistake of a clerk, whereby a Court is induced to enter a wrong judgment. *United States* v. *Sterling*, 70 F. (2d) 708 at 711. Certiorari denied, 293 U. S. 583, 55 S. Ct. 97.

Also, Court's decision is in direct conflict with its holding in *United States* v. *Sterling* (*supra*) to effect that carelessness of Government's counsel in failing to note case on general calendar call, and further failure of United States Attorney to inform special counsel of order of dismissal did not preclude Government of its right to have order of dismissal vacated, where the clerk had erroneously placed the same on the dismissal calendar.

The Circuit Court of Appeals in its opinion (R. 53) conceded that the dismissal order of November 9, 1937 and its formal granting and entry of May 19, 1938 was improper under the Rules of the District Court for the Western District of New York. Such an order, concededly improper, could not terminate this action inasmuch as under Rule XI of the local District Court Rules, no notice had been mailed by the clerk, as provided therein and further, any order entered pursuant to said Rule XI could only be entered without prejudice. This local rule was promulgated May 1, 1938 and is not in conflict with Rule 83 of the Federal Rules of Civil Procedure.

Further, the decision of the court below is in direct conflict with the decision of the Ninth Circuit (decided before Rules) which held that an order vacating previous order of dismissal, made after the expiration of term, as well as nine months after order of dismissal, was a proper exercise of Court's discretionary power. *Fidelity and Deposit Co. of Maryland* v. *MacGruer, et al.*, 77 F. (2d) 83.

II.

The Circuit Court of Appeals has interpreted Rules 6(b) and 6(c), as well as 60(b) of the Federal Rules of Civil Procedure, in a manner that, instead of clarifying, has added to the confusion concerning the interpretation of said rules.

Several of the prior decisions interpreting said rules are supported by the Circuit Court's opinion in this case:

Reed v. *South Atlantic S.S. Co.*, 2 F. R. D. 475;

Cassell v. *Barnes, et al.*, 1 F. R. D. 15;

Nachod and U. S. Signal Co. v. *Automatic Signal Corp.*, 32 F. Supp. 588;

Moran v. *Moran*, 31 F. Supp. 227.

Other decisions, in well-reasoned opinions, adopt a contrary rule of interpretation:

McGinn v. *U. S.*, 2 F. R. D. 562;

Cavallo v. *Agwilines, Inc.*, 2 F. R. D. 526;

Prevede v. *Hahn*, 36 F. Supp. 952;

Schram v. *O'Connor, et al.*, 2 F. R. D. 192.

The conflict on such question of law presented by the decision below should be settled by this Court. Not only is there such a conflict as to the decisions endeavoring to enunciate a legal interpretation, but there is also confusion as to content of record of proceedings of the American Bar Association Institute held in Cleveland in 1938 (see page 210) and also the record of Washington and New York proceedings (see pages 83, 84 and 135).

See *Schweinert* v. *Insurance Company of North America*, 1 F. R. D. 247 at 248.

Also, petitioner's counsel has been repeatedly queried as to the effect of the within decision and the probability of a final determination by this Court.

Conclusion.

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

DAVID W. WALLACE,
Petitioner.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

David W. Wallace, being duly sworn, deposes and says that he is the petitioner in the above entitled matter; that the foregoing petition is true as to his own knowledge except as to the matters as therein stated to be alleged

on information and belief and that as to those matters he believes it to be true.

DAVID W. WALLACE.

Sworn to before me this 20th day of May, 1944.

DOROTHEA V. SHERMAN,
Notary Public in and for
Erie County, New York.

[SEAL.]

WILLIAM B. MAHONEY,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1041

DAVID W. WALLACE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below, Jurisdiction, the Statement of Case, and Points Relied On.

Reference is made to the foregoing petition for the statements of opinion below, grounds of jurisdiction, statement of the case and points relied on.

ARGUMENT.

POINT I.

Court erred in holding that Government counsel could not, by consenting to the entry of the order of February 14, 1941, impliedly waive the defense of the statute of limitations, and therefore stipulate the jurisdiction of the Court.

Petitioner has no quarrel with the general proposition that the time limitation, as specified by Congress, for the

bringing of suit against the United States, cannot be abrogated or waived by a government official. Nor does petitioner disagree with the propriety of the decisions of *Finn* v. *U. S.*, 123 U. S. 227, and *Munro* v. *U. S.*, 89 F. (2d) 614, cert. denied 306 U. S. 36, cited in opinion below. However, petitioner does definitely assert that such decisions have no applicability to the facts surrounding the entry of the order of February 14, 1941, because jurisdiction of the subject matter had been acquired, pursuant to the provisions of the Tucker Act, in 1933 (R. 52).

Finn v. *U. S.* and *Munro* v. *U. S.* (*supra*) were situations wherein the original actions were not instituted within the time required by the statute which authorized such suits against the United States.[2] In neither of these cases had the claimants complied with the conditions contained in the statute authorizing suit against the United States; and inasmuch as such compliance was a condition precedent to the acquisition of jurisdiction of the United States, it followed that such actions were not properly before the Court.

The Circuit Court dwelt at considerable length in its opinion in *Hammond-Knowlton* v. *United States,* 121 F. (2d) 192; its suggestions relative to relaxing the rule of stinginess as to the interpretation of the consent to be sued given by statute, as well as the failure of this Court to adopt a more generous attitude, by its denial of certiorari at 302 U. S. 707 (R. 53-55). It requires a severe strain on one's reasoning powers to detect the slightest applicability of that case to our present question. In such case the claim for refund was filed in October 16, 1931; this was rejected and in 1933 taxpayer sued the Collector of Internal Revenue and won. After reversal in the Circuit Court, the lower

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[2] In *Finn* v. *U. S.*, claim was made for horses sold in 1863; claim was made in 1874; statute required claim to be filed in 6 years.

Munro v. *U. S.* was brought under World War Veterans' Act, and suit was instituted after lapse of time specified therein.

Court, in 1938, permitted an amendment nunc pro tunc, to substitute United States as a party defendant. The Circuit Court reversed because of the running of the statute of limitations.

There, the United States was never served with process at any time; consequently, no jurisdiction could be acquired without such service; also there never was a compliance with the other provisions of the statute, by which the United States consented to be sued.

The aforesaid cases, which the Circuit Court thought controlling in our present case, deal with the question of the utter failure to acquire original jurisdiction of the United States. Such acquisition of jurisdiction is conceded in our present case and the Trial Court could not be divested of its jurisdiction by the entry of an improper order.

The Circuit Court (footnote 3, R. 54) appears to have voiced its opinion that the ruling of this Court in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373 was spasmodic in character because of subsequent decisions. Such criticism appears inconsistent with the expression of this Court in *United States* v. *Shaw*, 309 U. S. 405, wherein it was said at page 501:

> "A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule."

Again it was said at the same page:

> "When authority is given, it is liberally construed."[3]

The Government here did not raise any question as to the jurisdiction of the District Court to either entertain the motion to vacate the order of May 13, 1938 or to grant the order of February 14, 1941 which set aside its previous

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[3] *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381.

order. It merely argued that the granting of such order would amount to an abuse of the Court's discretionary power (R. 13). Thereafter it prepared and submitted an Agreed Statement of Fact to petitioner's counsel (R. 29; Appendix B and D). Under such circumstances the phraseology of Judge Gardner in *U. S.* v. *Edwards*, 23 F. (2d) 477 at page 480, is pertinent to these facts:

> "A total want of jurisdiction of the subject matter cannot, of course, be waived, but where the court has general jurisdiction of the subject matter, and the jurisdiction of a particular case is dependent upon the existence of certain facts, the jurisdiction may be waived by a failure to make timely and specific objection."

It is undisputed that the Court had jurisdiction of the subject matter, and of the parties, and its jurisdiction extended to entertaining a motion to secure that relief which might be warranted under a writ of coram nobis or coram vobis. Surely, the enactment of the F. R. C. P. did not curtail the jurisdiction of the Court as to such motions.[4]

There was no waiver of original jurisdiction by the Government attorney or of the statute of limitations. The waiver, if such, was merely of the Government attorney's ministerial duty to assert the alleged defense upon the argument of such motion.

A waiver, by Government's attorney, in stipulating a recovery for a refund of taxes on grounds other than those asserted in the taxpayer's claim for refund, was before the Court in *Tucker* v. *Alexander*, 15 F. (2d) 556. The Circuit Court in affirming the lower Court held that it was a required limitation that the action shall be on the same grounds and only such grounds as were set forth in the

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[4] See *The Bern*, 74 F. (2d) 235 at 237.

claim for refund. This Court, in reversing, 275 U. S. 228, at page 231, said:

> "But no case appears to have held that such objections as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government, and decidedly in the interest of an orderly administrative procedure, that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose."

It was definitely to the interest of the United States that the conceded facts be admitted so that a determination might be made upon the merits. It did not waive any statute of limitation but urged the Court, in the exercise of its discretionary power, to deny the petitioner's application. When the U. S. attorney realized that the Court had decided to vacate the order of dismissal, in the exercise of its discretion, he then consented to the entry of such order on terms that the facts would be stipulated and an early trial would be had (Appendix B, D and E).

Point II.

The Court below erred in holding that the order of February 14, 1941 could not be supported unless it was authorized by Federal Rules of Civil Practice, 60 (b).

Such order provided as follows:

> "Ordered, that the above entitled action be dismissed for lack of prosecution, in accordance with the rules of this Court" (R. 8).

The Circuit Court conceded that there was no dispute that the dismissal order of November 7, 1937, and the formal entry of the same on May 13, 1938, was improper (R. 53).

In view of such concession, recourse is had to Rules XI, XIII and XVI of the Rules of the District Court for the Western District of New York, as well as to Rule 83 of the Federal Rules of Civil Procedure. The local rules were in effect May 1, 1938, and the Federal Rules of Civil Procedure took effect September 16, 1938.

Pursuant to Rule XIII only the petitioner had filed the note of issue for the respective terms of Court, including November 9, 1937 (R. 8).

There was never any contention, on the part of the Government, that the clerk of the Court had mailed the thirty-day notice as provided in Rule XI, and the giving of such notice is a condition precedent to the granting of an order of dismissal, or the entry of such an order as of course by the clerk. It will be observed that if the conditions precedent were properly executed, such an order would be entered, without prejudice.

Inasmuch as such order was improperly granted and entered under Rule XI, recourse must be had to the extent of the Government's authority, if any, to move for dismissal under Rule XVI and what redress there is for restoration. Such rule is of no avail to the Government because it has

been seen that only the petitioner filed and served a note of issue and such rule limits the right to move a case for trial to the party who has served a note of issue. The Government having failed to serve such note of issue was in no position to move the said case "Ready" (R. 8).

A further examination of Rule XVI reveals that if an order is granted striking a case from the calendar, it may be restored on two days' notice of motion and for good cause shown.

It necessarily follows that, under whatever rule the Government attaches any validity to its order of May 13, 1938, under Rule XI, the rule itself reads into such order "without prejudice", and Rule XVI provides that the case having been stricken from the calendar may be restored on two days' motion for good cause shown. The mistake in such case was on the part of the Trial Court, in the first instance, in granting such order, and thereafter on the part of the clerk in entering the same because there was no authority in any statute or rule which sanctioned such order or its entry.

The order of February 14, 1941, setting aside the order of May 13, 1938, and restoring the case to the calendar was therefore proper. *United States* v. *Sterling*, 70 F. (2d) 708. Said case was originally brought on the law side of the Court and was thereafter transferred to the Equity calendar. The matter was referred to a special master in February, 1928, and was submitted for decision in 1930. An order was made in June, 1932, dismissing said case for want of prosecution pursuant to General Rule XXXIII of the District Court for the Southern District of New York. The notice pursuant to rule was published in the New York Law Journal; order was made by Court, on its own motion, dismissing the suit; notice of dismissal was sent to the United States Attorney, but was not turned over to counsel for the Shipping Board. One year later, July, 1933, a motion

was made to vacate the order dismissing the cause under the aforementioned rule, which was denied. In reversing the District Court, Judge Augustus N. Hand said at page 711:

> "A mistake of the clerk, whereby the court is induced to enter a wrong judgment like a misrepresentation by a party or his counsel (even though innocent) upon which a judgment has been founded is a ground for annulling the judgment even after the term has ended. In either case the court may modify or vacate the judgment without resort to a separate suit in the nature of a bill of review. Winslow v. Staab (C. C. A.) 242 F. 426."

The Court further said at page 711:

> "While we must regard as careless the failure of the counsel in general charge of the litigation to observe the case on the general call calendar in 1932 and the failure of the United States attorney to inform counsel of the order of dismissal, notice of which was mailed to him by the clerk, there can be no justice in depriving the government of the decree in its favor because of these mistakes. They would never have been possible if the cause had not been erroneously placed on the call calendar. That initial mistake caused the whole trouble.
>
> The order of the District Court is reversed, with directions to the District Court to vacate the order of dismissal."

It will be noted that Justice Hand merely concurred in the result in our present case, which appears to present a reversal of his position in the *Sterling* case. Certiorari in the *Sterling* case was denied by this Court in 293 U. S. 593.

That part of Judge Hand's opinion in the *Sterling* case, presumably approved by this Court in denying certiorari, namely: "there can be no justice in depriving the government of the decree in its favor because of these mistakes" is more pertinent and applicable to our present case than to the facts in the *Sterling* case. There, a decision on the merits had not been rendered, and the Court was ever vigi-

lant to afford the Government the opportunity, devoid of technicality, to establish its cause of action. In our present case, judgment has been actually rendered, on the merits, and the Government raises no question as to the taxpayer's judgment on the merits.

Rule 83 of the Federal Rules of Civil Procedure empowers District Courts to make and amend rules governing its practice not inconsistent with said rules. A rule of the District Court for the Western District of Washington, relative to dismissal of action for want of prosecution (Rule 48), similar to Rule XI of our local Court herein, was held to be a validly enacted local rule under Rule 83 of the Federal Rules of Civil Procedure. *Hicks* v. *Bekins Moving and Storage Company*, 115 F. (2d) 406. The Court said at page 408:

> "Under Rule 83, therefore, it would appear that a district court has the power to provide for dismissal of causes for lack of prosecution by the court of its own motion."

Under Rule 83 and the local District Court Rules, it was in order for the Court to vacate an order striking a case from the calendar, for good cause shown.

Point III.

Circuit Court's ruling that Rule 6(b) and 6(c) of the F. R. C. P. does not suspend the operation of Rule 60(b) and empower a court to permit an act to be done after the expiration of the specified period where failure to perform same was due to excusable neglect, was error.

That the Court, in this case, considered that excusable neglect had been established, is best evidenced in the Trial Court's opinion, addressed to Government's motion to vacate, viz:

> "The motion to vacate was granted for reasons which the Court deemed sufficient." (R. 26).

Concededly, these rules were promulgated with a definite purpose in mind. At the time of their adoption this Court was familiar with the six-month limitation which was prescribed in Rule 60(b), and under most circumstances litigants were required to seek relief from judgments or orders within a reasonable time, not exceeding the aforesaid six months' period. However, the Court in adopting Rule 6(b) specifically empowered the Courts to permit an act to be done after the expiration of the period originally prescribed. This was a grant of broad discretionary power and again this Court was vigilant to prescribe the sole limit to such power, namely:

> "* * * it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as prescribed by law."

Inasmuch as the period of time prescribed in Rule 60(b) for service of a motion to relieve from an order through mistake, inadvertence, surprise or excusable neglect, is not expressly excepted, as a time which the Court cannot enlarge, it follows that such power is within the discretionary power of the Court.

Moore's *Federal Practice,* cited in the Circuit Court's opinion, on another point, states as to the effect of Rule 6(b) when considered in connection with Rule 60(b) at page 414:

> "Nevertheless, Rule 6(b) seems to give the court authority to enlarge the time to a day more than six months after the judgment, order, or proceeding was taken."

Such interpretation is given added weight by reference to the Cleveland proceedings of American Bar Association Institute at page 210. There it was specifically stated that the Court could permit an act to be done after the expiration

of the designated period for excusable neglect, with but two exceptions, both of which are embodied in Rule itself. The phraseology of the record of Proceedings of Institute in 1938 of Washington and New York Federal Rules of Civil Procedure, are instructive as to broad power of the Court under Rule 6(b). At page 83 it was said:

> "* * * and there are many other things in the rules which give them flexibility for a reasonable trial judge to administer in accordance with reason and the justice of a particular case."

The majority of the District Court decisions support Professor Moore's statement, as well as the record of proceedings at the American Bar Institute's hearings prior to their adoption. *McGinn* v. *U. S.*, 2 F. R. D. 562; *Cavallo* v. *Agwilines, Inc.*, 2 F. R. D. 526; *Preveder* v. *Hahn*, 36 F. Supp. 952; *Schram* v. *O'Connor, et al.*, 2 F. R. D. 192.

In *McGinn* v. *United States*, the Court, in 1940, allowed defendant's motion to dismiss, upon plaintiff's counsel's assent to same. Plaintiff moved to set aside such dismissal subsequent to August, 1942. Motion to vacate judgment was granted.

In *Cavallo* v. *Agwilines, Inc.*, suit was started on October 3, 1940; on December 23, 1941 an order of dismissal for lack of prosecution was entered; motion to vacate was made more than six months after entry of order. The Court, although holding that Rule 6(b) did not extend the six-months' term under Rule 60(b) nevertheless granted the relief and vacated the judgment.

In *Schram* v. *O'Connor*, the default judgment was entered September 9, 1939 and the defendant moved to set aside such judgment on July 3, 1940. The plaintiff's contention that the Court had no jurisdiction, citing Rule 60(b), was overruled in the following words at page 194:

> "* * * Therefore, so far as possible there should be a liberal interpretation of Rules and if Rule 6(b)

means anything at all it is to cover just such a case as this, provided the court finds that there was 'excusable neglect'; * * *"

"In other words, as interpreted by Burke *v.* Canfield, April 17, 1940, 72 App. D. C. 127, 111 F. 2d 526 when such a definite restriction is placed upon any further action by some rule there is nothing the district court can do to change it, but where the restriction is upon the parties themselves as under 60(b) and the court believes that it should inquire into whether the failure of either party to avail himself of some right was caused by 'excusable neglect', the court shall have that right."

In *Preveder* v. *Hahn*, plaintiff's counsel had signed stipulation consenting to dismissal on merits. Motion to vacate such order was made after six months. Court in granting order, held that applying Rules 6(b) and 60(b) to such facts authorized such an order, despite the fact that motion was made beyond the six-months' period.

There are cases which are suggestive of an interpretation contrary to the above, *Reed* v. *South Atlantic S. S. Co.*, 2 F. R. D. 475; *Nachod & U. S. Signal Co.* v. *Automatic Signal Corp.*, 32 F. Supp. 588; *Moran* v. *Moran*, 31 F. Supp. 227, and *Cassell* v. *Barnes*, 1 F. R. D. 15; but in no event are they applicable to the facts in the present case.

In *Reed* v. *South Atlantic*, the parties had been notified pursuant to local rule of a call of the calendar and the resultant order in event of failure to take action; this procedure was not followed in our present case. Further, it is to be noted that the Court did not consider the application of Rule 6(b) when construed in conjunction with Rule 60(b).

Nachod et al. v. *Automatic Signal Co.* involved a situation where two orders were made by District Court dismissing for lack of venue and that Signal Corp. was an indispensible party. Circuit Court affirmed appeal from latter order, no appeal having been taken from former order. Later a

decision of this Court was rendered in *Neirbo* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, which demonstrated order in *Nachod* case was error. In denying motion to vacate, Court held that plaintiff's motion was based upon the mistake of the Court, and that Rule 60(b) only concerned itself with the mistake of a party. The Court was doubtful of its ruling on such grounds and stated that even if it had power to grant the motion it would consider the exercise of the same as unwise. In our present case, the Court not only exercised its power, but considered it a wise, as well as a proper, application of the same.

Point IV.

Court is in error in its decision that relief which petitioner sought on his motion to vacate order of dismissal could not have been afforded to him before promulgation of present rules.

Rule 60(b) contains two exceptions, the first of which is applicable hereto, viz:

> "This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order or proceeding * * *"

The Circuit Court stated that it was in accord with the interpretation of the foregoing exception to Rule 60(b) as expressed in Moore's *Federal Practice*, 3255-3276 (R. 56). It also stated that it agreed with Moore that "action" was intended to cover whatever could have been done by a been accorded to him in an ancillary suit (R. 56-57).

The later substitute for the writ of coram nobis or coram vobis was a proceeding by motion. *United States* v. *Mayer*, 235 U. S. 55; Moore, 3257.

This writ could be brought after term and in some cases was allowed more than ten years after the judgment was rendered. Moore, 3257.

However, after expressing its full accord with Professor Moore's interpretation the Court said that the kind of relief that Wallace sought could not, before the Rules, have been accorded to him in an ancillary suit (R. 56-57).

This expression is in direct conflict with Moore 3257, and particularly his reference to the utilization of such writ to set aside a judgment of dismissal, taken after term, where a clerk erroneously placed the same on the calendar.[5]

In *New England Furniture* v. *Willcuts*, an improper order of dismissal was entered on April 1, 1930; a motion to vacate was brought in September, 1931, after the expiration of the term. The Court granted the motion to vacate stating that the error of the clerk was unknown to the Court, and the latter presumed it had jurisdiction to dismiss.

This case was decided in 1931, before the adoption of the present rules, and involved the identical relief sought in our present case by petitioner. It would therefore appear that the Circuit Court is not in full accord with Moore or that it has misinterpreted the statements and reasoning of such author at page 3257 and cases there cited.

In *Fidelity & Deposit* v. *Mac Gruer*, decided in 1933, a motion was made to vacate an order of dismissal "on ground that same was made through the inadvertence of some officer of the Court *or of the Court*" (italics mine). This motion was made at a subsequent term of the Court. The order was granted on the ground that such motion was in the nature of a common law writ of coram nobis or coram vobis.

In *United States* v. *Sterling*, the Second Circuit reversed an order denying plaintiff's motion to vacate an order dismissing the suit, the Court saying that a mistake of the

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[5] *New England Furniture & Carpet Co.* v. *Willcuts*, 55 F. (2d) 983. *Fidelity & Deposit Co. of Maryland* v. *Mac Gruer, et al.*, 77 F. (2d) 83. *U. S.* v. *Sterling*, 70 F. (2d) 708.

clerk * * * is ground for annulling the judgment even after the term is ended. It further held that such order could be made without resort to a separate suit in the nature of a bill of review.

That Wallace, before the promulgation of the Rules, could have secured the relief he sought is also supported by *McGinn* v. *U. S.; Cavallo* v. *Agwilines, Inc.* (supra).

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

William B. Mahoney,
Counsel for Petitioner,
405 Walbridge Building,
Buffalo, New York.

May 20th, 1944.

APPENDIX A.

Federal Rules of Civil Procedure:

Rule 1. *Scope of Rules.*

These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 6. *Time.*

* * * * * * *

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

Rule 60. *Relief from Judgment or Order.*

* * * * * * *

(b) Mistake; Inadvertence; Surprise; Excusable Neglect. On motion the court, upon such terms as are

just, may relieve a party or his legal representative from a judgment, order or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Rule 83. *Rules by District Courts.*

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Rules of the District Court of the United States for the Western District of New York:

Rule XI. *Dismissal for Want of Prosecution.*

In any cause or proceeding which might have been brought to trial or hearing, but in which no action has been taken by the parties for one year, it shall be the duty of the clerk to mail notice thereof to the attorneys of record or to the parties thereto, if their post-office addresses are known, thirty days before the opening of the next succeeding March or November term of court. If such notice has been given and no sufficient cause be shown at the opening of such term of court, an order of dismissal without prejudice shall be entered by the clerk as of course.

Rule XIII. *Note of Issue.*

Any party may place a cause upon the trial calendar of any term by filing and serving a note of issue in accordance with New York Rule of Civil Practice 150, and a new note of issue shall be necessary for any subsequent term.

Rule XVI. *Trial Calendar and Adjournments.*

Causes shall be placed on the trial calendar in the order of their respective dates of issue. The first ten causes on the calendar for any term shall constitute the day calendar for the first day fixed for the trial of civil causes at that term. The day calendar for each subsequent day of the term shall consist of ten causes taken in regular order from the general calendar of causes not disposed of, and shall be made up by the clerk not later than four P. M., on the preceding day. Any cause so placed on the day calendar by the clerk shall be deemed ready for trial and may be moved by either party who has served a notice of issue as provided in these rules. If the cause so placed on the day calendar is not moved by either party at the call of the calendar at the opening of court, it must be stricken from the calendar and shall not be restored to the same or to any subsequent calendar of the court except on motion on at least two days' notice and for good cause shown. No adjournments or continuances shall be allowed except for good cause shown.

APPENDIX B.

"GLG:LH

Department of Justice
United States Attorney
Western District of New York
Buffalo, N. Y.

January 25, 1941.

Mr. William B. Mahoney,
Attorney at Law,
405 Walbridge Bldg.,
Buffalo, N. Y.

SIR:

Re: Edward E. Trost vs. U. S.

No. 1321-A.

David W. Wallace vs. U. S.

No. 1320-A.

I talked with Judge Knight the other day about these cases. He is inclined to deny the motion to restore the Wallace case. He suggested, however, that an additional affidavit be filed, setting forth the fact that the Trost case is on the calendar and that the facts in each case are identical, with the exception of the amount involved and the name of the plaintiff.

He also suggested that attached to your affidavit you file suggested findings of fact. Then, if the Trost findings of fact are filed and the case presented for decision, he probably would be inclined to open the default in the Wallace case. There must be an agreement to proceed forthwith in each case, if the Wallace case is restored.

Please give this matter your immediate consideration.

Respectfully,

GEORGE L. GROBE,
United States Attorney."

APPENDIX C.

"March 20, 1941.

George Grobe,
U. S. District Attorney,
Courthouse,
Niagara Square,
Buffalo, N. Y.

DEAR GEORGE:

Re: Trost *v.* United States, Wallace *v.* United States.

More than three weeks have elapsed since I delivered to you stipulations in the above entitled matter and I wish that you would inform me as to whether or not these stipulations were forwarded to Washington and if so, whether or not they have been returned. If the latter fact may I have copies of the same by return mail.

Many thanks for your courtesy in this particular matter.

Very truly yours,

WILLIAM B. MAHONEY."

WMB:BS.

APPENDIX D.

"RMH:VM.

Department of Justice,
United States Attorney,
Western District of New York,
Buffalo, N. Y.

March 21, 1941.

Mr. William B. Mahoney,
Attorney at Law,
405 Walbridge Building,
Buffalo, New York.

SIR:

Re: David W. Wallace *v.* U. S., Edward E. Trost *v.* U. S., Docket Nos. 1320-A & 1321-A.

In reply to your letter dated March 20, 1941, we beg to advise that there has been some delay by reason of the illness of Mr. Hitchcock.

You will please find enclosed herewith the original of a stipulation in each of the above cases. You will note that paragraphs 7 and 8 of your proposed stipulation dated February 6, 1941, have been slightly altered in the wording of each. You will likewise note that the stipulation itself has been reworded so as to permit evidence to be introduced at the trial with respect to the details of the various securities and stocks which are the subject matter of the dispute.

If the enclosures are satisfactory, please sign the same and return to us and we will thereupon sign them and submit conformed copies to you. We can then arrange for an interview with Judge Knight, at which time a date can be set for the trial of these actions.

Respectfully,

Encls.

GEORGE L. GROBE,
United States Attorney."

APPENDIX E.

"RMH:VM.

Department of Justice,
United States Attorney,
Western District of New York,
Buffalo, N. Y.

April 22, 1941.

Mr. William B. Mahoney,
Attorney at Law,
405 Walbridge Building,
Buffalo, New York.

SIR:

Re: David W. Wallace *v.* U. S., Docket No. 1320-A.
Edward E. Trost v. U. S., Docket No. 1321-A.

In reply to your letter dated April 17, 1941, we beg to advise that you will please find enclosed herewith one copy of the stipulation of facts in each of the above entitled cases. The original of each was filed in the office of the Clerk of this Court on April 21, 1941.

If you will arrange with Mr. Hitchcock for an appointment with Judge Knight, we believe the trial could be set in each case for a day agreeable to all the parties.

Respectfully,

Encls.

GEORGE L. GROBE,
United States Attorney."

INDEX

CITATIONS

596606—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 105

DAVID W. WALLACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 32–36) is reported in 50 F. Supp. 178. The opinion of the District Court upon the motion to restore the case to the calendar (R. 26–27) is not officially reported. The opinion of the Circuit Court of Appeals (R. 51–57) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 4, 1944 (R. 58). The petition for a writ of certiorari was filed May 27, 1944.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The District Court dismissed this case for lack of prosecution on May 13, 1938. On November 4, 1940, the plaintiff, who is the petitioner here, filed a motion to restore the case to the calendar, alleging that the failure to prosecute was due to the inadvertence and neglect of counsel. The question is whether the District Court's order of February 14, 1941, vacating its previous order of dismissal and restoring the case to the calendar, was authorized under the Rules of Civil Procedure.

RULES INVOLVED

The applicable rules are set forth in the Appendix, *infra,* pp. 10–12.

STATEMENT

This suit was brought on October 14, 1933 (R. 1), for the recovery of alleged overpayment of the petitioner's income tax for 1929 (R. 3–6). The United States filed an answer on January 24, 1934 (R. 1), joining issue with respect to the petitioner's right to recover (R. 6–7). The case was noticed for trial by counsel for the petitioner, and continued to be so noticed from March 1934 to November 1937 (R. 8, 12). Upon the call of

the calendar on November 9, 1937, when the case was reached, counsel for the petitioner did not appear (R. 8–9, 13). The court thereupon dismissed the case upon motion of Government counsel, and a formal order of dismissal for lack of prosecution was entered on May 13, 1938 (R. 7–8, 13).

Thereafter, on November 4, 1940, the petitioner filed a motion to restore the case to the calendar under Rule 16 of the Rules of the District Court for the Western District of New York (R. 9–10; *infra,* p. 12). His former counsel filed a supporting affidavit which stated in substance that, due to the press of his duties as State Senator, the case was allowed to be dismissed because of his inadvertence and neglect (R. 10–11). The Government opposed the motion on the ground that seven years had elapsed since the suit was begun, without any action towards trial of the case (R. 11–14). A reply affidavit by counsel for the petitioner asserted that the delay up to March 9, 1936, was caused by the pendency before the Board of Tax Appeals of a similar controversy involving the 1930 income tax liability of a partner of the petitioner, and that such proceeding was not concluded until 1936 (R. 14–17).

On February 14, 1941, the District Court set aside its previous order of dismissal (R. 17–18). On August 5, 1941, the Government moved to vacate the order restoring the case to the calendar

(R. 19–22). In a responsive affidavit, counsel for the petitioner stated that the United States Attorney had consented to the restoration of the case provided the facts were stipulated so that the case could proceed to an early trial; that the parties had entered into such a stipulation; and that the case was ready for trial (R. 23–25). The District Court denied the Government's motion (R. 26–27). When the case came on for trial on December 16, 1942, the Government renewed its motion for dismissal on the ground that the order of February 14, 1941, was invalid (R. 31–32). In denying this motion, the District Court stated that counsel for the Government consented to the February 14, 1941, order (R. 33). The case was then tried on the merits, and resulted in a judgment for the petitioner in the amount of $4,419.35, plus interest (R. 39–40).

Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment below was reversed on the ground that Rule 60 (b) of the Federal Rules of Civil Procedure (*infra*, pp. 10–11) requires that a motion to relieve a party from any order taken against him through his mistake, inadvertence, surprise, or excusable neglect must be made within six months after such order; that the order of February 14, 1941, vacating the dismissal order of May 13, 1938, was therefore invalid, and the District Court was without jurisdiction to proceed further; and that the consent of Government

counsel to the entry of the order of February 14, 1941, was ineffectual to waive the statute of limitations (R. 55–57). Judge A. N. Hand concurred in the result (R. 57).

ARGUMENT

1. The court below correctly held that under Rule 60 (b) of the Rules of Civil Procedure the District Court could not on February 14, 1941, vacate its order of May 13, 1938, dismissing the suit for lack of prosecution. The petitioner contends that the express six-months' limitation contained in Rule 60 (b) upon the granting of relief from orders entered through mistake, inadvertence, surprise, or excusable neglect, is qualified by the general provisions of Rule 6 (b), which reads as follows:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as

> stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

The lower federal courts have generally held in accord with the decision below, however, that the specific six-months' limitation of Rule 60 (b) cannot be enlarged under Rule 6 (b). See *Nachod & United States Signal Co.* v. *Automatic Signal Corp,* 32 F. Supp. 588, 589 (D. Conn.); *McGinn* v. *United States,* 2 F. R. D. 562 (D. Mass.); *Cavallo* v. *Agwilines, Inc.,* 2 F. R. D. 526 (S. D. N. Y.); but see *Schram* v. *O'Connor,* 2 F. R. D. 192 (E. D. Mich.).

The failure of the draftsmen of the Rules to provide expressly that Rule 6 (b) does not enlarge the time limit specified in Rule 60 (b) is explained by Professor Moore as follows:

> A comparison of Rule 60 (b) as promulgated with Rule 57 (b) of the April 1937 draft affords a probable explanation for the failure to include in the final clause of Rule 6 (b) the time provided for serving a motion for relief from a judgment. Rule 57 (b) of the April 1937 draft required that the motion be served before the expiration of the time for appeal. Hence, since Rule 6 (b) provided that the time for appeal could not be enlarged, it followed necessarily that the time for service of the motion for relief from a judgment could not be enlarged. Rule 60 (b) as promulgated, however, changed the time for serving the motion to a period in no case

> exceeding 6 months after the entry of judgment. Rule 6 (b) was not changed to harmonize with the change made in Rule 60 (b). The wording of Rule 60 (b) indicates that the draftsmen intended that the period for serving the motion should not be enlarged. Failure to make the appropriate changes in Rule 6 (b) was apparently an oversight and not intentional.

(1 Moore, Federal Practice (1938), p. 414, n. 1.)

The Advisory Committee on Rules for Civil Procedure has considered this question, and its *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States,* submitted to the bench and bar in May 1944, invites consideration of two proposed amendments to Rule 6 (b), both of which would explicitly provide that the time limitations in various Rules, including 60 (b), could not be enlarged under Rule 6 (b). *Id.*, pp. 1–9. Since these proposed amendments to the Rules will eventually be submitted to this Court, we suggest that the question of the relationship of Rule 6 (b) to such other Rules may be more appropriately considered by the Court at that time rather than in the present proceeding.

2. The petitioner has conceded that, unless the February 14, 1941, order is valid, his claim is barred by the statute of limitations (R. 52). The

consent of counsel for the Government to the order restoring the case to the calendar is immaterial since, as the court below properly held (R. 53–55), an officer of the United States can not effectively waive the statute of limitations. *Munro* v. *United States,* 303 U. S. 36; *Finn* v. *United States,* 123 U. S. 227; *United States* v. *Nashville, etc., Ry. Co.,* 118 U. S. 120; cf. *United States* v. *Garbutt Oil Co.,* 302 U. S. 528, 534.

3. The court below correctly rejected the petitioner's contention that Rule 60 (b) is inapplicable here because his motion to restore the case to the calendar was "an action to relieve a party from a judgment, order, or proceeding," and hence expressly excepted from Rule 60 (b). As Professor Moore points out (3 Moore, Federal Practice (1938), pp. 3254–3276), the history of the exception clause clearly shows that it was intended to preserve the power of the court to grant extraordinary relief, notwithstanding expiration of the term, upon writs of error *coram nobis,* or bills of review or in the nature of bills of review, or upon independent suits based on fraud. But, as the court below held (R. 57), "The kind of relief Wallace sought here could not, before the Rules, have been accorded him in such ancillary proceedings, and he made no charge of fraud." Cf. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* No. 398, Oct. Term 1943, decided May 15, 1944. Consequently, the petitioner's motion inescapably fell within the limitations imposed by Rule 60 (b).

CONCLUSION

It is respectfully submitted that the case was correctly decided by the court below; that no questions warranting further review are presented; and that the petition for a writ of certiorari should therefore be denied.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
PAUL R. RUSSELL,
Special Assistants to the Attorney General.

JULY 1944.

APPENDIX

Federal Rules of Civil Procedure:

RULE 6. *Time.*

* * * * *

(b) *Enlargement.*—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

(c) *Unaffected by Expiration of Term.*—The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

* * * * *

RULE 60. *Relief from Judgment or Order.*

* * * * *

(b) *Mistake; Inadvertence; Surprise; Excusable Neglect.* On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Rules of the District Court of the United States for the Western District of New York (Effective November 1, 1938):

RULE 11. *Dismissal for Want of Prosecution.*

In any cause or proceeding which might have been brought to trial or hearing, but in which no action has been taken by the parties for one year, it shall be the duty of the clerk to mail notice thereof to the attorneys of record or to the parties thereto, if their post-office addresses are known, thirty days before the opening of the next succeeding March or November term of court. If such notice has been given and no sufficient cause be shown at the opening of such term of court, an order of dismissal without prejudice shall be entered by the clerk as of course.

(This is a revision of Rule 8 in effect prior to November 1, 1938.)

RULE 16. *Trial Calendar and Adjournments.*

Causes shall be placed on the trial calendar in the order of their respective dates of issue. The first ten causes on the calendar for any term shall constitute the day calendar for the first day fixed for the trial of civil causes at that term. The day calendar for each subsequent day of the term shall consist of ten causes taken in regular order from the general calendar of causes not disposed of, and shall be made up by the clerk not later than four P. M., on the preceding day. Any cause so placed on the day calendar by the clerk shall be deemed ready for trial and may be moved by either party who has served a notice of issue as provided in these rules. If the cause so placed on the day calendar is not moved by either party at the call of the calendar at the opening of court, it must be stricken from the calendar and shall not be restored to the same or to any subsequent calendar of the court except on motion on at least two days' notice and for good cause shown. No adjournments or continuances shall be allowed except for good cause shown.

(This is a revision of Rule 12 in effect prior to November 1, 1938.)

U. S. GOVERNMENT PRINTING OFFICE: 1944